Supreme Court, U.S.
FILED
JUN 7 2011

No. 10-1249

IN THE

Supreme Court of the United States

RICHARD A. TROPP,
ON BEHALF OF HIMSELF AND ALL OTHERS
SIMILARLY SITUATED,

Petitioner,

v.

CORPORATION OF LLOYD'S,
ALSO KNOWN AS THE SOCIETY OF LLOYD'S,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONER

Mark S. Davies
Rachel M. McKenzie
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th St., NW
Washington, DC 20005

Kevin K. Russell
Counsel of Record
GOLDSTEIN, HOWE &
RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@ghrfirm.com

June 7, 2011

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. Whether State Recognition Acts, As Applied By Most States, Comport With The Requirements Of The Due Process Clause Warrants This Court's Review. 1

A. The Due Process Clause Does Not Permit Enforcement Of A Foreign Judgment That Was Obtained Without Adherence To Basic Due Process Principles Simply Because The Foreign System As A Whole Is Generally Fair. 2

B. The Due Process Standard For Enforcement Of Foreign Judgments Is An Issue Of Recurring And Increasing Importance. 3

C. Lloyd's Alternative Grounds For Affirmance Provide No Basis For Denying Review Of The Ground Upon Which The Case Was Actually Decided. 5

II. The Second Circuit's Forum Selection Clause Ruling Warrants Review. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Abbott v. Abbott,
130 S. Ct. 1983 (2010) 6

Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust for S. California,
508 U.S. 602 (1993) 8

In re Patry,
691 N.Y.S. 2d 611 (1999) 12

Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA,
130 S. Ct. 1605 (2010) 6

Mars v. Diocese of Rochester,
763 N.Y.S.2d 885 (2003) 12

Shell v. R.W. Sturge, Ltd.,
55 F.3d 1227 (6th Cir. 1995) 11

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme,
433 F.3d 1199 (9th Cir. 2006) (en banc) 4

Statutes and Constitutional Provisions

U.S. CONST. amend. V ..... passim

U.S. CONST. amend. XIV 2

28 U.S.C. § 2403(b) 13

28 U.S.C. § 4102(a)(1) 4

Other Authorities

JONATHAN DRIMMER, THINK GLOBALLY, SUE LOCALLY: OUT-OF-COURT TACTICS EMPLOYED BY PLAINTIFFS, THEIR LAWYERS, AND THEIR ADVOCATES IN TRANSNATIONAL TORT CASES (2010) 4

Rules

S.Ct. R. 29.4(c) 13

REPLY BRIEF FOR PETITIONER

I. Whether State Recognition Acts, As Applied By Most States, Comport With The Requirements Of The Due Process Clause Warrants This Court's Review.

The drafters of our Constitution took great care to establish procedural limitations on courts' power to deprive individuals of their property. Those constitutional protections, however, are largely bypassed when a court deprives a citizen of his property based on the judgment of a foreign court, obtained through proceedings not subject to American constitutional protections and potentially at odds with basic American conceptions of due process. Lloyd's does not contest that a state's enforcement of a foreign judgment is subject to Due Process scrutiny. And it acknowledges that in this case, the only scrutiny the Second Circuit afforded the procedural fairness of Lloyd's' U.K. judgment was to ask whether it was obtained through a *system* that is generally fair. Lloyd's further confirms that this is all the scrutiny that is afforded foreign judgments in the majority of states, pursuant to their enactment of the Uniform Foreign Money-Judgments Recognition Act. BIO 19-20.

Lloyd's nonetheless resists certiorari, arguing that such cursory review is all that the Due Process Clause requires. That claim, and Lloyd's' other grounds for denying certiorari, are meritless.

A. The Due Process Clause Does Not Permit Enforcement Of A Foreign Judgment That Was Obtained Without Adherence To Basic Due Process Principles Simply Because The Foreign System As A Whole Is Generally Fair.

Providing only system-level review of foreign judgments is at odds with the text of the Due Process Clause, which establishes an individualized right to a fundamentally fair process in every case, not simply a right to a system that ordinarily affords due process. *See* U.S. CONST. amends. V & XIV; Pet. 24-25.[1] A judgment may not be affirmed on appeal, despite the showing of a denial of due process below, simply because the trial court ordinarily affords due process. And even judgments entered by American states under the direct regulation of the Due Process Clause, and subject to Full Faith and Credit, do not escape all individualized Due Process review when enforcement is sought in another state. *See* Pet. 24-25.

Lloyd's nonetheless insists that the Constitution permits lesser scrutiny of foreign judgments. For this proposition, it cites to nothing in the Constitution or the constitutional decisions of this Court. Instead Lloyd's simply points to an alleged

---

[1] Both the district court and the Second Circuit passed on petitioner's Due Process claim, Pet. App. 5a, 53a-54a, which he presented in detail to both courts, *see* Plaintiff's Memorandum of Law In Support of Summary Judgment Motion § C; Plaintiff's Reply Memorandum § III; C.A. Appellant Br. § III, *contra* BIO 17-18.

consensus among states and scholarly organizations. BIO 20-22. But even if policymaking bodies may find it expedient to forgo meaningful due process scrutiny of foreign judgments – in order to promote a unified world legal system, international trade, or other policy goals – that is hardly a ground for upholding the practice's constitutionality. The entire point of the Due Process clause is to protect individuals from procedural shortcuts governments might otherwise take in pursuit of other interests.

Recognizing meaningful constitutional limitations on the recognition of foreign judgments does not amount to "constitutionalizing hostility to the recognition and enforcement of foreign judgments." BIO 32. Foreign judgments can be respected without converting American courts into mere enforcement arms of foreign legal systems. It is not too much to ask that when a party seeks to use the coercive power of an American court to execute a foreign judgment, the court should first assure itself that it is not thereby becoming a party to a violation of basic due process rights.

B. The Due Process Standard For Enforcement Of Foreign Judgments Is An Issue Of Recurring And Increasing Importance.

Lloyd's asserts that this constitutional question is unimportant because of recent legislation and courts' ability to refuse enforcement of problematic foreign judgments on other grounds. BIO 18-19. That argument fails on its own terms, and misses the broader point.

First, the new federal statute addresses only defamation judgments and has no application to any

other kind of case, even if the judgment is patently incompatible with First Amendment (or any other constitutional) values. *See* 28 U.S.C. § 4102(a)(1); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc) (confronting non-defamation judgment that violated First Amendment principles).

Second, as illustrated by the scores of judgments Lloyd's itself has obtained in the United States, the First Amendment is not the only constitutional principle at risk from the lax scrutiny afforded foreign judgments from otherwise reliably fair judicial systems.[2]

More importantly, Lloyd's does not deny the Chamber of Commerce's report that a "growing number of notable actions . . . have been filed in foreign courts, with the plaintiffs seeking to obtain judgments they can enforce in the United States." JONATHAN DRIMMER, THINK GLOBALLY, SUE LOCALLY: OUT-OF-COURT TACTICS EMPLOYED BY PLAINTIFFS, THEIR LAWYERS, AND THEIR ADVOCATES IN TRANSNATIONAL TORT CASES 4 (2010). The possibility that some fundamentally unfair judgments may be denied enforcement on other grounds, BIO 18-19, is

---

[2] Lloyd's' carefully worded statement that "there is no particular reason to believe that any similar actions will be filed in the future," BIO 8-9, ignores that Lloyd's continues to pursue collection on recognized judgments against many Names, *id.* 9 n.9; that it retains the right to bring new actions on current judgments, *id.* 8-9, and that if further capital infusions for Equitas become necessary at any time during the eighty-year life of the R&R Equitas trust, it has the right to sue tens of thousands of Names to cover the deficiency, *see* Pet. 17 n.14.

no excuse for foregoing direct scrutiny of the procedural fairness of particular judgments.

As Lloyd's itself documents, BIO 20-22, the degree of due process scrutiny given foreign judgments varies significantly from state to state. Lloyd's judgment in this case would have been subject to case-specific scrutiny in the states adopting the 2005 revision of the Uniform Act (although, inexplicably, the Act affords courts discretion to enforce a foreign judgment even after finding that it was obtained in violation of basic due process principles). *Id.* Such arbitrary variation in constitutional protection is untenable.

The continuing disagreement within and between the states, the ALI, and the NCCUSL, BIO 20-22, as well as the lack of any movement to enact federal legislation, demonstrates that only a decision from this Court has any prospect for restoring national uniformity and basic constitutional protections for citizens across the nation.

C. Lloyd's Alternative Grounds For Affirmance Provide No Basis For Denying Review Of The Ground Upon Which The Case Was Actually Decided.

Having little to say in defense of the decision the Second Circuit actually rendered, Lloyd's spends much of its brief hypothesizing other ways in which the court of appeals could have ruled in its favor but did not. BIO 24-30.[3] That a respondent may have

---

[3] Notably, however, Lloyd's does not claim that the court of appeals' forum selection clause holding is an alternative ground

other defenses to raise on remand is no reason to deny review of the ground upon which the case was actually decided. *See, e.g., Abbott v. Abbott*, 130 S. Ct. 1983, 1997 (2010) (deciding question presented and remanding for adjudication of alternative defenses); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1610 n.3 (2010) (same). Moreover, Lloyd's' alternative grounds are waived and meritless.

1. Lloyd's argues that the U.K. judgment would satisfy any individualized due process scrutiny. BIO 24-30. But it did not urge affirmance on this ground in the Second Circuit,[4] and provides no convincing support for its assertion here.

The parties generally agree on the relevant features of the English system: Lloyd's was allowed to impose the R&R contract upon Names without their consent (BIO 5); the only ground for resisting Lloyd's demands for payment was proof of arithmetic or similar facially obvious "manifest errors" (*id.* 6); and although post-deprivation counterclaims were nominally allowed, the only way to contest liability for the reinsured debt or challenge its amount was to prove Lloyd's had engaged in fraud (*id.* 3). Accordingly, Lloyd's does not contest that under U.K. law, Tropp was required to pay whatever Lloyd's demanded even if he could show that Lloyd's was legally responsible for the reinsured debt (*e.g.*, because it breached its original contract with him by

---

for rejecting Tropp's challenge to the enforceability of the U.K. judgment. *See* BIO 14 n.14; Pet. 34-35.

[4] *See* C.A. Appellee Br. 44-45.

permitting him to be placed in environmental syndicates, or by unlawfully refusing to accept his resignation) or if he could show that the amount of the premium was incorrect for reasons not amounting to manifest error or fraud (*e.g.*, because Lloyd's failed to credit him for assets owed to him and held by Lloyd's, including personal stop loss insurance). Thus, even if Tropp's wrongful liability and missing assets claims have merit – and even if, as a result, he actually owed Lloyd's nothing – the U.K. courts were compelled to order Tropp to pay Lloyd's what it demanded. *See generally* McBride Amicus Br.

That system of laws is wholly foreign to American notions of due process. The fact that U.K. courts heard Tropp out, before telling him there was nothing they could do, does not satisfy due process. *Contra* BIO 24-26. To return to an example from the petition – which Lloyd's ignores – there would be no question that a state violates Due Process by requiring immediate payment of disputed taxes and then claiming sovereign immunity to bar any refund action, even if the courts politely listened to the taxpayer before dismissing his refund claim. Pet. 30.[5]

Nor is it a defense to argue, as Lloyd's does, that the hearings were rendered pointless because of substantive law. BIO 26-27. The same would be true in the tax refund example – the claim would be

---

[5] Nor has the New York Stock Exchange been permitted to use its common law immunity offensively to prevent challenges to its assertion of liability against its members. *Cf.* BIO 15 n.17.

barred by the substantive law of sovereign immunity. And the same would have been true in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993). *See* Pet. 30-32. There, it was substantive federal law that purportedly allowed pension trustees to charge withdrawing employers whatever they thought right, subject to revision only upon proof of clear error. Yet this Court held that such limited review would likely violate the Due Process Clause. 508 U.S. at 626.

Lloyd's' only answer to *Concrete Pipe* is its insistence that in that case the employers never agreed to the limitations on review, whereas in this case, Tropp did. BIO 28-29. But Tropp no more waived his right to contest liability than did the employers in *Concrete Pipe*. While the U.K. courts are entitled to engage in fanciful fictions of consent for their own purposes, whether a judgment founded on such a fiction should be enforced in a U.S. court is a question of U.S. law. And Lloyd's cites no U.S. authority supporting its assertion that Tropp consented to waive his basic due process rights simply by agreeing to be bound by current and future Lloyd's byelaws. Were that the law, this Court just as easily could have held in *Concrete Pipe* that by agreeing to join a multiemployer pension plan that is obviously subject to current and future federal regulation, the employers consented to any

diminution in their due process rights Congress might subsequently enact.[6]

2. Lloyd's Statement also suggests that even though the R&R system precluded U.K. courts from inquiring into the merits of any of Tropp's claims, the courts nonetheless rejected his claims and defenses on the merits. BIO 11-12. This suggestion – also never urged as a ground for affirmance in the Second Circuit – is false.

First, Lloyd's asserts that the U.K. courts held that Tropp's "wrongful liability" claims "amounted to claims that but for the misconduct of his agents, certain risks would not have been underwritten" and that agency law principles precluded any defense against Lloyd's' suit based on that misconduct. BIO 11. But the U.K. court never reached that conclusion (and did not even mention the agency law principles Lloyd's attempts to insinuate into its opinion). *See* Pet. App. 132a. It simply held that Tropp's claims did not constitute the type of "wrong years" defense cognizable as *manifest error* and as such did not "lie against Lloyd's" in its collection action, but rather must be raised in counterclaim. *Id.* 132a-133a. And when Tropp raised these claims in counterclaim, the court did not hold that they were barred by the prior decision Lloyd's cites, or that they were meritless under principles of agency law. The appellate court

---

[6] Respondent's further claim that it was an unbiased adjudicator of Tropp's liability to Lloyd's is frivolous. Lloyd's assessed the Equitas premium, then purchased (for pennies on the dollar) the right to collect it, keeping whatever it collected for itself (rather than for Equitas's reserves to protect policy holders). Pet. 10.

held that they were barred by Lloyd's' immunity. Pet. App. 62a-63a, 69a-72a.

Second, Lloyd's suggests that the U.K. court held that Tropp's missing assets claims were meritless because any failure to account for them was the result of his own, or his agents', failures rather than Lloyd's'. BIO 12. But the passages Lloyd's cites simply recite *Lloyds' allegations* and do not represent the court's own findings. *See* Pet. App. 134a, 135a.

Third, Lloyd's assertion that Tropp raises claims of misconduct only against his agents, and not against Lloyd's itself, *see* BIO 9-11 & n.12, is demonstrably false. Tropp sued Lloyd's for its own unlawful actions, including conduct that had nothing to do with his agents (*e.g.*, Lloyd's failure to credit him for funds it ordered his agents to hand over). Pet. 8-9, 38. If Tropp did not in fact owe Lloyd's the money it claimed, he had no obligation to pay it, even if he could have passed on the cost of Lloyd's wrongful judgment to someone else (at great risk and expense to himself). *See also* Pet. 38-39 (explaining practical futility of suing agents).

* * * * *

The Second Circuit did not consider any of Lloyd's' alternative defenses because it concluded that it was enough that the judgment was rendered by a U.K. court. But the Due Process Clause requires Lloyd's to demonstrate (not simply allege), and a U.S. court to find (not simply assume), that Tropp was afforded basic due process abroad.

II. The Second Circuit's Forum Selection Clause Ruling Warrants Review.

Lloyd's does not deny that circuits disagree over the standard for refusing to defer to a foreign tribunal because of limitations on remedies in that forum. *See* Pet. 35-37. Instead, Lloyd's points out that this Court has previously denied certiorari in cases involving Lloyd's' forum selection clause, BIO 13, and offers alternative grounds for affirmance, *id.* 14-16.

The Court's denial of certiorari in prior cases is irrelevant. Until proven false by Tropp's exhaustion of U.K. remedies in this case, Lloyd's' claim that remedies were available in post-deprivation counterclaim remained untested.[7] Moreover, in all the prior cases, the plaintiffs' claims alleged securities fraud, for which there is an arguable remedy in U.K. law given the fraud exception to Lloyd's immunity. Tropp, however, challenged unlawful conduct that did not involve fraud (*e.g.*, failure to credit missing assets and violation of the terms of his original contract with Lloyd's) for which there is no arguable U.K. remedy. Accordingly, the forum selection question that was poorly presented in

---

[7] *See* Pet. 13-14. Lloyd's' attempt (BIO 3 n 3) to explain away its false representations to U.S. courts fails. *Compare, e.g., Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227, 1231 (6th Cir. 1995) (noting that the "affidavit of Barrister John Lewis Powell shows that '[o]ne of the remedies under English law for misrepresentation (whether innocent, negligent or fraudulent) is rescission'" *with* Pet. App. 85a (U.K. court holding rescission unavailable as a matter of law).

the prior cases is squarely presented here. *See* Pet. 37-38.

Lloyd's' assertion of numerous alternative defenses to Tropp's accounting claim also provides no reason to deny review. This Court would never decide a forum selection question if it waited for a case in which the defendant disavowed having any other defense. Moreover, Lloyd's defenses were never raised below and are meritless. Having insisted to American courts that Names litigate their claims in England, Lloyd's is estopped from complaining that Tropp attempted to exhaust his claims in the U.K. before suing here.[8] Moreover, if the Court were to determine that it was fundamentally unfair to require petitioner to litigate his claims against Lloyd's in the U.K., it necessarily follows that Lloyd's' prior judgment under the U.K. system could not bar litigation of the claims here. *Contra* BIO 15. Nor does Lloyd's cite any choice-of-law authority that would require courts in this country to apply the very limitations on remedies that rendered the U.K. forum fundamentally unfair. *Contra id.*

---

[8] *See, e.g., Mars v. Diocese of Rochester*, 763 N.Y.S.2d 885, 888 (2003) (New York recognizes doctrine of equitable estoppel); *cf. also In re Patry*, 691 N.Y.S. 2d 611, 613 (1999) (limitation period tolled during exhaustion of mandatory arbitration).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[9]

Respectfully submitted,

Mark S. Davies
Rachel M. McKenzie
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th St., NW
Washington, DC 20005

Kevin K. Russell
Counsel of Record
GOLDSTEIN, HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814
(301) 941-1913
krussell@ghrfirm.com

June 7, 2011

---

[9] Although petitioner provided an electronic version of the petition to the Solicitor General of New York when the petition was filed, to his knowledge, no court has certified to the State Attorney General the fact that the constitutionality of New York's recognition act has been drawn into question by this litigation. Because 28 U.S.C. § 2403(b) may apply, copies of the petition and this reply brief have been served on the State. *See* S.Ct. R. 29.4(c).